

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES OF AMERICA,

Plaintiff,

v.

LORENZO MARTINEZ-VELASCO

Defendant.

Cause No. IP 05-0203M-01

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Cause No. IP 05-0203M-01
)	
LORENZO MARTINEZ-VELASCO)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

This cause came before the Court on May 19, 2005, for an initial appearance on a Complaint and Arrest Warrant issued on May 18, 2004. At that time, the government moved for the defendant's detention on the basis that the defendant presented a serious risk of flight per 18 U.S.C. §3142(f)(2)(A). The hearing was held pursuant to 18 U.S.C. § 3141 *et seq.* The defendant requested a preliminary examination and detention hearing which were both held on May 25, 2005. The preliminary examination was held prior to the consideration for detention. The United States appeared by Gayle L. Helart, Assistant United States Attorney, and the defendant appeared in person and by appointed counsel, William Dazey.

Based on the information presented in the preliminary examination, there is probable cause to believe that the defendant committed the crime he is charged with in the Complaint. The defendant is held to answer in the District Court. The detention hearing demonstrated that there is no condition or combination of conditions which will necessarily reasonably assure the appearance of the defendant or the safety of the community by more than clear and convincing evidence. The defendant was ordered detained.

Findings of Facts and Conclusions of Law

1. The defendant, Lorenzo Martinez-Velasco (hereafter “Velasco”) was charged by way of Complaint on May 18, 2005, for being an alien who was found in the United States after having been deported subsequent to his conviction for an aggravated felony in violation of 8 U.S.C. Sec. 1326(a) and (b)(2).

2. The penalty for a violation of § 1326(a) and (b)(2) is up to 20 years imprisonment, up to \$250,000 fine, and up to 3 years supervised release, however the defendant will likely be deported following any term of imprisonment.

3. This Court takes judicial notice of the Complaint and affidavit attached thereto in this Cause. The Court further incorporates the evidence from the affidavit of the Complaint and Arrest Warrant. For the preliminary examination, the government called Deputy Wendel Birdsong from the Marion County Sheriff’s Department and Special Agent David Victor from the Immigration and Customs Enforcement (United States Department of Homeland Security). Counsel for Velasco had an opportunity and did cross-examine Deputy Birdsong and Agent Victor on the issues presented in the preliminary examination. The defendant did not call any witnesses for the preliminary hearing. The defendant was held to answer in the District Court.

4. On the issue of detention, the government did not call any further witnesses and submitted on the testimony and evidence that the Court already had. Counsel had the opportunity to cross examine either of the government witnesses on the issue of detention. The defendant did not call any other witnesses. The defendant did put on a proffer of evidence relating to the fact that he was married, had a child born in the United States and he and his wife were purchasing a home.

5. The Court admitted a Pre-Trial Services Report (PS3) on the issue of Velasco’s

release or detention. Velasco is approximately is age 24 listing his DOB as 9/24/80. The PS3 contains Velasco's criminal history. That history shows that Velasco has been convicted of a crime of violence from Fresno, California in 1998 of Assault with Intent to Commit Rape, a felony, in Cause No. F98908582-0. Velasco was sentenced to two years imprisonment. This offense is considered an aggravated felony per immigration law under 8 U.S.C. §1101(a)(43)(F) (crime of violence for which the term of imprisonment was at least one year).

6. Velasco was deported following his term of imprisonment on approximately August 10, 1999, to his country of citizenship of Mexico. Velasco has not been given permission to be in the United States by the Attorney General.

7. The circumstances leading to Velasco being discovered by federal agents include that Velasco was shopping at a warehouse store on Rockville Road in Indianapolis, Indiana. In the store, store personnel noticed Velasco and his associate in the electronics department opening boxes. Velasco was not contacted or questioned about theft. Velasco was seen leaving the store and driving away from the parking lot. Store personnel attempted to record his license plate as he left. Velasco drove back to the parking lot, parked his vehicle and then approached a store manager and began cursing and talking loudly, angry at being watched. Deputy Birdsong, working as store security and dressed in full uniform, approached the manager and Velasco to see what the problem was. Velasco then began to curse at the officer and did not follow Deputy Birdsong's directives to quiet down because other customers were showing hesitation to come out of the store near where they were standing. Deputy Birdsong told Velasco that if he did not quiet down he would be arrested. Deputy Birdsong stated that Velasco's conduct violated Indiana state laws of Disorderly Conduct and Intimidation because he was loud and aggressive, and failed to follow his orders to quiet down in the public place they were in.

8. When a motion for pretrial detention is made, the Court engages in a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

9. A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, § 3142(f)(2); *United States v. Sloan*, 820 F. Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. § 3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F. Supp.2d 592, 595 (D.Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F. Supp. 260, 265 (W.D.N.Y. 1998) (same). In this case, the United States moves for detention pursuant to § 3142(f)(2)(A) and the Court has found this basis exists.

10. Once it is determined that a defendant qualifies under any of the six conditions of § 3142(f), the court may order a defendant detained before trial if the judicial officer finds that

no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S. Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F. Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S. Ct. 2095, 2099, 95 L. Ed. 2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F. Supp. at 596; *United States v. Knight*, 636 F. Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S. Ct. 1804, 1812-13, 60 L. Ed. 2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

11. This Court considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards

set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S. Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

12. The Court finds there is clear and convincing evidence (even though the Court need find only by a preponderance of the evidence) that the defendant presents a serious risk of flight if released. Upon his arrest for the current offense, Velasco possessed a Mexican identification document with his name, his photograph and an Indianapolis address. Velasco did not possess a valid driver's license. Velasco possessed two Sam's Club cards and a bank debit type card in the names of other individuals. Velasco repeatedly denied that the Assault with a Rape conviction was his and claimed that it was his brother who was convicted of the offense. These denials continued even after Deputy Birdsong procured a photograph from other law enforcement records and confirmed the visual match and the presence of a scar on the defendant's shoulder. Velasco states he is married and has a child now who was born in the United States, and that he works as an independent contractor. It is, however, illegal for Velasco to be in and work in the United States at all. Velasco has a serious prior violence felony conviction which will count as an aggravated felony and he was deported after his term of imprisonment. The Court notes that Velasco will be deported following any judicial proceedings on the current case and there has been a detainer placed on him for this purpose by the Immigration and Customs Enforcement agents. From his history, Velasco shows the Court

that he can freely travel back and forth between Mexico and the United States since he has been both in the Southern District of Indiana and in Fresno, California. The defendant is fluent in English. He claims to have reentered after his deportation in April 2003 by paying \$1000 for the services of a smuggler to get him into the country, even though he knew it was illegal for him to be here. The weight of the evidence is strong in this case and he is facing a substantial term of imprisonment. His past criminal and deportation history show him to be a flight risk and potential danger to the community.

13. The evidence presented in this case demonstrates there is no condition or combination of conditions of release that would reasonably assure the defendant's appearance in court as ordered or the safety of the community.

WHEREFORE, LORENZO MARTINEZ-VELASCO is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. Mr. Martinez-Velasco shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver Mr. Martinez-Velasco to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

DATED this ___ day of _____, 2005.

KENNARD P. FOSTER
Magistrate Judge
United States District Court

cc:

Gayle L. Helart
Assistant United States Attorney
10 West Market Street, Suite 2100
Indianapolis, Indiana 46204

William Dazey
Indiana Federal Community Defenders
111 Monument Circle, Suite 752
Indianapolis, Indiana 46204

U. S. Marshal

U. S. Probation Office
Pre-Trial Services Division